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November 12, 1999

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in WT Docket No. 96-98

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206, the Real Access Alliance, through undersigned counsel, submits this original and one copy of a letter disclosing an oral and written ex parte presentation in the above-captioned proceeding.

On November 10, 1999, the following representatives of the Real Access Alliance met with Ari Fitzgerald of Chairman Kennard's office:

Jim Arbury	National Apartment Association and National MultiHousing Council;
Anna Chason	National Association of Real Estate Investment Trusts;
Roger Platt	Real Estate Roundtable;
Reba Raffaelli	National Association of Industrial and Office Properties;
Steven A. Wechsler	National Association of Real Estate Investment Trusts;
Judith L. Harris	Reed, Smith, Shaw and McClay;

Stephen Rosenthal	Cooper, Carvin & Rosenthal;
Nicholas P. Miller	Miller & Van Eaton, P.L.L.C. and
Matthew C. Ames	Miller & Van Eaton, P.L.L.C.;

The meeting addressed access to buildings by telecommunications providers. The attached written ex parte presentation was given to Mr. Fitzgerald at the meeting.

Please contact the undersigned with any questions.

Very truly yours,

Miller & Van Eaton, P.L.L.C.

By Matthew C. Ames

cc: Ari Fitzgerald, Esq.

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Calendar No. 534

95TH CONGRESS, 1st Session | SENATE | REPORT No. 95–580

COMMUNICATIONS ACT AMENDMENTS—PENALITIES AND FORFEITURES AUTHORITY AND REGULATION OF CABLE TELEVISION POLE ATTACHMENTS BY THE FEDERAL COMMUNICATIONS COMMISSION

NOVEMBER 2 (Legislative day, NOVEMBER 1), 1977.—Ordered to be printed

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Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation submitted the following

REPORT

[To accompany S. 1547]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1547) to amend the Communications Act of 1934, as amended, with respect to penalties and forfeitures, and to authorize the Federal Communications Commission to regulate pole attachments, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

SUMMARY AND PURPOSE

The bill (S. 1547) serves two purposes:

(1) To unify, simplify, and enlarge the scope of the forfeiture provisions of the Communications Act of 1934; and

(2) To establish jurisdiction within the Federal Communications Commission (FCC) to regulate the provision by utilities to cable television systems of space on utility poles, ducts, conduits, or other rights-of-way owned or controlled by those utilities.

PENALTIES AND FORFEITURES

S. 1547, as reported, would unify and simplify the forfeiture provisions in the Communications Act of 1934, enlarge their scope to cover all persons subject to the act, provide more practical limitations periods and more effective deterrent levels of forfeiture authority, and would generally afford the Federal Communications Commission greater flexibility in the enforcement of the Communications Act and rules and regulations promulgated thereunder.

29–010

FCC jurisd'n did not extend to utility poles etc. — I find ancillary jurisd'n over them, no ancillary jurisd'n on 6b areas

fering with the right of nonsubscribers to the quiet enjoyment of their own radio and television reception. And, unlike the service a system provides to its own subscribers, there are few, if any, marketplace incentives for such leakage to be repaired. The individual subject to the interference may have no idea that the poor quality picture he receives is anything other than the result of natural propagation difficulties and general radio noise. While there may well be cable operators in rural areas and backwoods hills and hollows whose radiation seems at this time to cause no injury to anyone, we see no practical way of differentiating in the rules between this minority and the majority of cable operations whose leakage has a potential for creating real reception problems.

The FCC's present enforcement tools of cease and desist and revocation of certificates of compliance are totally inadequate in the cable television area. The forfeiture alternative is essential. The purpose of S. 1547, as reported, is to treat all parties subject to the Communications Act equitably and fairly and is not exclusively aimed at CATV. Any exception for CATV would work great unfairness on other industries which are less likely than cable operators to be familiar with FCC rules and regulations but are nevertheless subject to forfeiture authority.

The committee notes that S. 1547, as reported, is prospective in its effect for cable operators. Section 7 of the bill, as reported by the committee, specifically provides that any act or omission which occurs prior to the effective date of this act shall incur liability under the provisions of existing forfeiture authority as then in effect. Therefore, cable operators will not be subject retroactively to increased forfeitures for violations which occurred prior to the effective date of S. 1547.

POLE ATTACHMENT REGULATION

It is the general practice of the cable television (CATV) industry in the construction and maintenance of a cable system to lease space on existing utility poles for the attachment of cable distribution facilities (coaxial cable and associated equipment). These leasing agreements typically involve the rental of a portion of the communications space on a pole for an annual or other periodic fee as well as reimbursement to the utility for all costs associated with preparing the pole for the CATV attachment. The FCC estimates that there are currently over 7,800 CATV pole attachment agreements in effect. Approximately 95 percent of all CATV cables are strung above ground on utility poles, the remainder being placed underground in ducts, conduits, or trenches. These poles, ducts, and conduits are usually owned by telephone and electric power utility companies, which often have entered into joint use or joint ownership agreements for the use of each other's poles. It is estimated that approximately 4+ percent of all utility poles owned by either telephone or electric utilities are actually jointly used. These joint utility agreements commonly reserve a portion of each pole for the use of communications services (telephone, telegraph, CATV, traffic signaling, municipal fire and police alarm systems, et cetera). This communications pole space is usually under the control of the telephone company.

Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles. The number of poles owned or controlled by cable companies is insignificant, estimated to be less than 10,000, as compared to the over 10 million utility-owned or controlled poles to which CATV lines are attached.

Sharing arrangements minimize unnecessary and costly duplication of plant for all pole users, utilities as well as cable companies. Nevertheless, pole attachment agreements between utilities which own and maintain pole lines, and cable television systems which lease available space have generated considerable debate. Conflict arises, understandably, from efforts by each type of firm to minimize its share of the total fixed costs of jointly used facilities. Of the more than 10 million poles on which cable operators lease space, fewer than half are controlled by telephone companies, while 53 percent are controlled by power utilities, public and private. Most CATV systems lease space from more than one utility. An estimated 72 percent of all cable systems lease pole space from Bell Telephone operating companies, approximately 65 percent have agreements with investor-owned power companies, an additional 21 percent lease space from independent telephone companies, while 10 percent attach to poles owned by REA cooperatives and 14 percent acquire space from utilities owned by municipalities.

Due to the local monpoly in ownership or control of poles to which cable system operators, out of necessity or business convenience, must attach their distribution facilities, it is contended that the utilities enjoy a superior bargaining position over CATV systems in negotiating the rates, terms and conditions for pole attachments. It has been alleged by representatives of the cable television industry that some utilities have abused their superior bargaining position by demanding exorbitant rental fees and other unfair terms in return for the right to lease pole space. Cable operators, it is claimed, are compelled to concede to these demands under duress. The Commission's Office of Plans and Policy, in a staff report released in August 1977, concluded that, "[a]lthough the reasonableness of current pole attachment rates remains open to question, public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates" (page 34).

The committee received testimony that the introduction of broadband cable services may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future. The Commission has investigated the competitive interrelationships of telephone and cable companies in various proceedings and contexts, and has taken action to curtail potential anticompetitive practices in several instances. (See for example, *Common Carrier Tariffs for CATV Systems*, 4 FCC 2d 257 (1966); *General Telephone Co. of California*, 13 FCC 2d 448, *aff'd.* 413 F. 2d 390 D.C. Cir. *cert. denied*, 396 U.S. 888 (1969). See also, *General Telephone Co. of the Southwest* v. *United States*, 449 F. 2d 846, 857 (5th cir. 1971).)

REGULATION OF BUILDING ACCESS IS UNNECESSARY AND THE COMMISSION HAS NO AUTHORITY TO ADOPT SUCH REGULATIONS

- **Regulation Is Unnecessary Because the Market Is Working.**

  - The CLECs themselves admit that they are rarely denied access, and have not identified building access as a material risk factor in their securities filings.
  - The CLEC industry has grown enormously in a short time without regulation of building access.
  - Real estate is a highly competitive market: owners grant access because they recognize value of providing tenants with telecommunications options. CLEC anecdotes are not evidence of market failure, but of the market working.
  - Based on the record before the Commission, it would be an abuse of the Commission's discretion to regulate access to buildings. *Home Box Office, Inc. v. FCC,* 567 F.2d 9 (D.C. Cir. 1977).
  - Why extend regulation to an unregulated sector of the economy?

- **The Commission Has No Jurisdiction or Authority Over Building Owners.**

  - The Commission lacks jurisdiction over real property ownership in general, even when the property is used in a regulated activity or might have an incidental effect on a regulated activity. *See Regents v. Carroll*, 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *Illinois Citizens Comm. for Broadcasting v. FCC,* 467 F.2d 1397 (7th Cir. 1972).
  - Building owners as such are not engaged in communications by wire or radio.
  - Even if the Commission has jurisdiction over wiring owned by building owners, it has no authority to act against building owners because no provision of the Act confers such authority. The Commission has acknowledged that building owners are not subject to its "regulatory scrutiny." *Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network,* CC Docket No. 81-216, *First Report and Order,* 97 FCC 2d 527 (1986) at ¶ 14.
  - The Commission's ancillary jurisdiction does not extend to entities over whom the Commission has no jurisdiction to begin with. *GTE Service Corp. v. FCC,* 474 F.2d 724, 735-36 (2d Cir. 1973); *Illinois Citizens Committee,* 467 F.2d at 1400.

- **The Commission Has No Authority To Impose Public Utility Style Regulation of Building Access, Even if such Regulation Were Justified.**

  - The Commission is not empowered to enforce the antitrust laws, except with relation to Title III licensees. *United States v. Radio Corp. of America,* 358 U.S. 334 (1959); Communications Act, §§ 313, 314.
  - The Federal Trade Commission has recognized that building owners are not monopolists. *Premerger Notification, Reporting and Waiting Period Requirements,* 61 Fed. Reg. 13666, 13674 (March 28, 1996). Building owners compete directly for tenants with other owners and must meet their needs to succeed.

- Tenants are not "locked in." Every year, approximately 20% of office tenants and over a third of apartment residents move.

- **Section 224 Does Not Apply to Facilities Located Inside Buildings.**

  - Section 224 was never intended to include access to buildings, and has never been interpreted to do so.
  - Building owners, and not utilities, own and control ducts and conduits inside their buildings.
  - Utility access rights inside buildings are not rights-of-way because they typically take the form of licenses and leases. Although easements may sometimes constitute rights-of-way, licenses and leases do not.
  - In any event, utility access rights are defined by state law, and the Commission cannot alter existing property rights.
  - Because of the enormous variety in the terms of access rights, the Commission cannot effectively use Section 224 to achieve its policy goal.

- **Any Attempt To Impose an Access Requirement Would Violate the Fifth Amendment.**

  - Any nondiscriminatory access requirement effects a *per se* physical taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Gulf Power Co. v. United States,* No. 98-2403, 1999 U.S. App. LEXIS 21574 (11th Cir. Sept. 9, 1999).
  - The Commission cannot adopt a rule that effects a taking without express authority from Congress. *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Congress has not given the Commission general authority to effect takings, nor has it authorized the Commission to establish a mechanism to compensate building owners for property occupied by CLECs.
  - The Commission cannot expand utility access rights under Section 224 without effecting a taking in a large number of cases.
  - Even the CLECs acknowledge that in certain cases a forced access requirement may constitute a regulatory taking, because owners have investment-backed expectations.

- **The Commission Cannot Extend the OTARD Rules to Common Areas and Nonvideo Services.**

  - The current OTARD rules are invalid because Section 207 was merely a directive to use existing authority to preempt certain governmental and quasi-governmental restrictions, and the Commission has no authority over building owners. For the same reason, the Commission cannot extend the rules to nonvideo services.
  - The Commission has correctly recognized that to extend the rules to common areas and restricted use areas would violate the Fifth Amendment.

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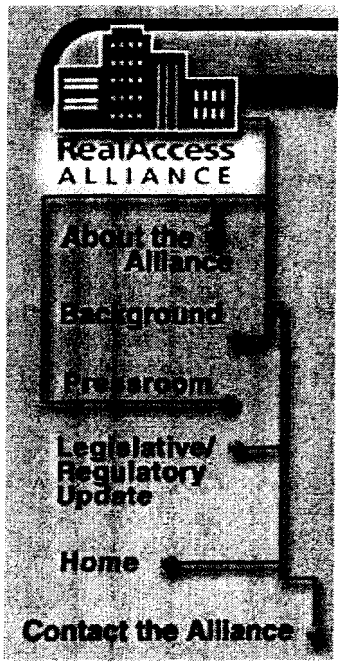

Encouraging Telecom Competition While Safeguarding Real Estate Owners' Rights

Frequently Asked Questions

Some telecom companies have told Congress and the FCC that they need federal intervention because they're having difficulty gaining access to buildings. Is this true?

Not according to the experience of thousands upon thousands of buildings and tenants the Real Access Alliance represents across the country. In fact, an **independent survey** conducted by Charlton Research Company- which covered all geographic regions and building types across the country - found that nearly two-thirds (65%) of all requests fielded by building owners and managers from telecommunications companies within the last year regarding potential telecom services either led to approval for building access or to contract negotiations. This demonstrates that the market is working and that government intervention is unnecessary. In addition, there are many valid reasons why a solicitation may not result in access, such as contractual difficulties, lack of space or security concerns.

Claims of an access bottleneck are in stark contrast to the telecom companies' own statements. For example, on **July 8** and **August 10, 1999**, **Winstar Communications, Inc.** announced that it had obtained access rights to more than 700 commercial office buildings in the second quarter of 1999 - setting a new company record for the quarter - and had access rights to more than 5,500 buildings in key U.S. markets. Another major telecom provider, **Teligent Inc.**, reported that at the end of the second quarter of 1999, it had signed leases or options for 4,252 customer buildings. That represents a 37 percent increase from the total at the end of the first quarter. Because of this success, **Teligent Inc.** announced that it was raising its target for the number of buildings it expects to have under lease or option by the end of the year by 20 percent to 6,000. Many other companies have announced similarly impressive progress toward building out their networks.

Have there been instances where telecommunications providers have refused to provide service to buildings?

Unlike the Bell-type companies (known in the industry as Incumbent Local Exchange Carriers, or ILECs), who were required by law some years ago to provide "universal coverage," today new telecommunications companies (referred to as Competitive Local Exchange Carriers, or CLECs) can pick and choose which buildings they wish to serve. If you are fortunate to own an office building with affluent tenants in a major metropolitan area, acquiring service from a telecom provider is not a problem, since there is ample competition. However, cases have been reported where service has been denied due to a building's location and tenant mix. There is, in fact, evidence of telecom provider "cherrypicking" among city office buildings. Thirteen percent of those responding to the **Charlton survey** reported that they had been denied service by a telecommunications service provider. Some of the reasons given to building owners when service was denied included: the tenant "profile" of the building was unappealing; the building was in the "wrong" location; the provider refused to plug into the building's carrier neutral backbone; and the investment return was insufficient.

Are there instances where telecom companies have been denied access to buildings? If so, why?

Given the large number of competitive service providers and the finite leasable space in demand, owners and managers clearly cannot accommodate every solicitation they receive. In those cases where providers have been denied access, our survey data shows there are valid reasons. Chief among them is that the provider(s) refused to meet standard

contractual requirements agreed to by a great majority of other providers for building access. In other cases, the provider(s) had no credible business track record; there was no tenant demand for their services; the provider could not meet relevant building codes; or would not assume liability for the safety and security of the building infrastructure. Other providers insisted on exclusive access rights to the building - a request, that in some cases, would have undermined or limited tenant choices of telecom services.

What incentives are there for building owners to provide state-of-the-art telecommunications services to their tenants?

Tenants will, and do, vote with their feet by moving to another building if their telecom needs aren't being met by their present building owner. And they have an extraordinarily wide range of buildings to choose from. In the U.S. alone, there are about 1 million buildings with publicly leasable space (or 12.3 billion square feet).

In such a highly competitive market, the availability of advanced telecommunication services, ranging from high-quality voice and high-speed data to Internet access, is an increasingly important feature of private buildings. In fact, in the survey conducted by **Charlton Research**, 82% of building owners and managers responded that tenant demand/satisfaction and building marketability were the primary reasons for offering telecommunication services to their tenants.

Increasingly, building owners are investing millions of their own dollars to create "smart buildings," which serve as showcases for new telecommunications technologies and as magnets for high-tech tenants. For example, Rudin Management Company's building at **55 Broad Street** in New York City is considered to be one of the most technologically advanced building in the nation. The building, known as the New York Information Technology Center, provides its tenants with a wide range of technologies, such as high-speed Internet access, satellite communications, videoconferencing and a variety of telecommunications options. NYITC's tenants have access to six local telephone providers, seven long distance carriers and 11 Internet access providers. In today's real estate market, "wired buildings" are no longer a luxury - they're a necessity.

Do building owners charge telecom companies for access to their buildings?

Yes, just as they charge "rent" to other tenants who occupy or use valuable space within the building. The means of determining an appropriate rent varies among tenants. For some tenants, location, instead of mere square footage occupied, is the most relevant criteria for determining reasonable rent. For example, we all know that an 800 square foot penthouse suite with a view is a more desirable location than an 800 square foot basement apartment and, therefore, commands a higher rent. The lease process is similar for all persons who want to use or occupy valuable building space. For some tenants, such as retail tenants, a percentage of sales - or "contingent rent" - may be most appropriate. This rent takes into account the fact that a building offers not only a physical base of operations, but also aggregates tenants and attracts additional customers.

Under any scenario, it is unreasonable for telecom service providers to expect free access to a building and its pool of tenants. Owners risk millions of dollars in capital to construct buildings that aggregate the tenants who are most desirable to these telecom firms. Telecom providers, in turn, should recognize that space in a building and access to its tenants are a valuable commodity and that the price for renting that commodity necessarily varies with the location and use of the space.

How common are "exclusive" contracts between building owners and telecom service providers?

Exclusive contracts are uncommon. In most cases, building owners seek to offer the widest range of telecommunication options for their tenants through multiple providers. However, one out of every four **building owners who were surveyed by Charlton Research** said they had been approached by a competitive carrier requesting exclusive access.

In a limited number of circumstances, generally involving apartment buildings, exclusive contracts may be the only way to induce telecom companies to provide services to tenants. Having been rejected by an established telecom service provider for geographic or economic reasons, a building owners' only option may be to contract with a smaller, less established upstart telecom company. In these instances, an exclusive contract may be warranted to provide some assurance of a revenue stream (or the chance to create one) to cover the costs of their investment in connecting to a particular building. More often than not, however, exclusivity is rejected by building owners on the ground it will limit tenant choices.

Don't the Baby Bells have an unfair access advantage?

The Baby Bell-type telephone providers (ILECs) aren't subject to this type of "rent" because they entered buildings long ago under monopoly conditions and are obligated under federal law to serve all tenants. Attempting to compare the Baby Bells' unique status with that of newer telecom service providers - who are free to pick and choose among properties and tenants - is like trying to compare apples and oranges. Of course, as the Bell-type companies expand their range of products, such as broad band telecommunications, more and more building owners are seeking compensation arrangements comparable to those with newer telecom service providers.

Can the government take privately-owned property and let another person use it for their purposes?

No. Our founding fathers recognized the dangers of government intervention in private property. That's why the Fifth Amendment to the U.S. Constitution provides that "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." Forced access is clearly a violation of the Fifth Amendment and, if implemented, would require just compensation to building owners whose property has been taken from them for the telecom providers. In essence, telecom providers want what amounts to a federal subsidy to expand their business - and they want to do it on the backs of building owners. Any FCC action giving telecom providers access at non-market rates would amount to a taking of property - a wireless land grab.

Are there state laws regarding forced access?

A substantial majority of states that have considered forced access proposals have rejected them. Of the 17 states that have considered forced access in the past three years, 14 have rejected forced access. Of the three that did not reject forced access outright, two are still under consideration and one allowed a telecommunications provider to enter property only with the agreement of the building owner. Three states implemented forced access provisions before the Telecommunications Act of 1996 was enacted: Connecticut, Texas and Ohio. The impact and constitutionality of such measures, however, have yet to be determined. In fact, there is anecdotal evidence to suggest that such measures have actually stifled competition. Since these statutes were enacted before the Telecom Act, they are not relevant guides for today's post-Telecom Act deregulatory environment.

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